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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re J.M. et al, Persons Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

PATRICIA M.,

Defendant and Appellant.

D050205

(Super. Ct. No. NJ11096A-B)

APPEAL from an order of the Superior Court of San Diego County, Harry M.
Elias, Judge. Affirmed.

Patricia M. appeals an order denying her Welfare and Institutions Code section 388 petition,¹ in which she requested the court vacate an order setting a section 366.26 hearing and placing her two children, J.M. (J.) and C.M. (C.), in her care. She argues the

¹ All statutory references are to the Welfare and Institutions Code.

court abused its discretion because she had completed much of her case plan and was able to care for the children safely. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

On June 22, 2004, the San Diego County Health and Human Services Agency (the Agency) petitioned under section 300, subdivisions (b) and (d) on behalf of six-year-old J. and his younger sister, C. The petition alleged the children's father, Joseph M., had sexually abused the children's minor cousins, he was an untreated sex offender, and Patricia allowed him to live in the family home in violation of the terms of his probation. The petition further alleged Patricia had a mental illness, said she wanted to kill herself and took an overdose of medication.²

The social worker reported Patricia explained that when Joseph was released from jail on probation he had nowhere to go, so she allowed him to stay with her and the children. She said she did not believe he had molested his nieces or would touch his children sexually, but she acknowledged he had exposed himself to family members and neighbors.

² J. had been a dependent of the juvenile court from August 1997 until May 1999 based on a section 300, subdivision (b) petition that alleged he was at risk because Patricia consumed alcohol excessively during her pregnancy and was not providing necessary medical attention for him, and there was domestic violence in the home. The parents successfully completed their case plans and, at the 18-month hearing, the court placed J. with them and terminated jurisdiction.

The court found the allegations of the petition to be true. On August 3, 2004, it detained the children and ordered the parents to have psychological evaluations and to comply with their case plans.³

The psychologist who conducted Patricia's evaluation diagnosed her with recurrent depression caused by the children's removal and said she had limited insight and poor judgment. She told him she became suicidal toward the end of 2003 and attempted suicide by taking an overdose of medication. He said she did not take responsibility for her mistakes as a parent and recommended she have psychotherapy and parenting education. Patricia's therapist said Patricia was attentive and engaged during therapy sessions. However, the social worker said she had little ability to show that she had learned from services. At the six-month review hearing in February 2005, the court ordered six more months of services.

Patricia had substance abuse treatment and then entered an after care program. Subsequently, her therapist opined she had made great progress and was ready to reunify with the children. She had completed an anger management program, was participating in parenting classes and the Safe Paths program and in July 2005 began having weekly two-hour unsupervised visits. At the 12-month review hearing in August 2005, the court ordered six more months of services.

³ The court found the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) applied in the case. The Cherokee Nation of Oklahoma intervened and participated in the proceedings.

Patricia stopped therapy in July 2005, then resumed in October. For a time she missed meetings and did not participate in Safe Paths, but she then began attending again. The social worker reported Patricia was maintaining sobriety, but she continued to believe Joseph was not a child molester.

On April 13, 2006, the court found Patricia had made moderate progress in mitigating the causes of the dependency, but not substantive progress with the provisions of her case plan. It terminated services and set a section 366.26 hearing.

On August 24, 2006, Patricia petitioned under section 388, requesting modification of the August 2004 order removing the children from her custody. She requested the court return the children to her care or provide her with additional services. She alleged she had benefited from services and could be an appropriate parent. The social worker reported Patricia had made good progress with services, but when the Safe Paths program closed and she was referred to similar treatment, she did not follow up on the referrals. He opined, although Patricia had participated in many programs and had regular affectionate visits with the children, she had not been able to make sufficient changes to be able to be an appropriate parent.

At a hearing on Patricia's petition on November 29, 2006, the court accepted Patricia's offer of proof that if she were to testify she would say she regularly visited the children, continued participating in Safe Paths for two months after the court terminated services and had an appointment to again begin counseling. Also, her divorce from Joseph would be finalized that day. She stated she saw Joseph as a sexual perpetrator,

she was financially stable, had an appropriate home for the children, and continued to go to 12-step meetings.

After considering the evidence, the court denied Patricia's petition, finding she had shown changed circumstances, but it was not in the children's best interests to be returned to her custody. The court selected guardianship as the permanent plan for the children.

DISCUSSION

Patricia contends the court abused its discretion by denying her section 388 petition. She argues she completed much of her case plan and was able to be a good and effective parent to her children.

Section 388 provides in part:

"(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of the court previously made or to terminate the jurisdiction of the court. . . .

[¶] . . . [¶]

"(c) If it appears that the best interests of the child may be promoted by the proposed change of order . . . the court shall order that a hearing be held"

In order to gain the relief sought in a section 388 petition, the petitioner must show both a change of circumstances or new evidence and that the change sought is in the child's best interests. (§ 388; Cal. Rules of Court, rule 5.570; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) "It is not enough for a parent to show *just* a genuine change of circumstances under the statute[,], the parent must [also] show that the undoing of the

prior order would be in the best interests of the child." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) A petition is liberally construed in favor of its sufficiency. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.) The petitioner bears the burden of proof, however, to make both showings. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

In *In re Kimberly F.*, *supra*, 56 Cal.App.4th 519, 530-532, the appellate court listed three factors a court might consider when determining if a child's best interests would be served by granting a section 388 petition: (1) the seriousness of the problem that led to the dependency and the reasons for any continuation of the problem; (2) the strength of the bond between the child and the caretaker; and (3) the degree to which the problem may be removed and the degree to which it has been removed.

The problems that led to the dependency included Patricia allowing Joseph to live in the home in violation of the terms of his probation after he had been convicted of sexually molesting his young nieces. In addition, Patricia had attempted suicide by taking an overdose of medication and was hospitalized as a result. Patricia continued to doubt whether Joseph posed a danger to J. and C. and, even when she acknowledged the molestations occurred, she blamed the nieces. She questioned why she needed to participate in therapy and quit for a three-month period before the court terminated her services. She had a difficult time completing the second phase of the Safe Paths program and after that program closed did not follow up with new referrals the social worker provided. When unsupervised visits with the children began in July 2005, it was anticipated they would lead to overnight visits and then to a 60-day trial visit. But Patricia showed poor judgment by encouraging the children to lie about her living

situation and allowing people who had not had required background checks to be alone with them, necessitating that visits again be supervised. Although Patricia had made great strides in services, serious problems remained that showed she could not yet be a safe parent.

When reunification services have been terminated the focus is on the needs of the child for permanency and stability, rather than on the parent's interest in the care, custody and companionship of the child. (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 464.)

The children had been in five different foster care placements and needed stability. At the time of the hearing, they recently had been placed with their maternal aunt. She had known them all of their lives and was committed to providing them with a permanent and stable home. The social worker reported they had made a good transition into the aunt's home and she was willing to provide them with the care they needed. Patricia, on the other hand, had participated in numerous services during the many months of the dependency, but had not been able to make the changes in her life that would ensure she would be able to provide a safe, permanent home. She has not shown an abuse of the court's discretion.

DISPOSITION

The order is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.